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October 5, 2007

VIA ELECTRONIC MAIL

The Honorable Benjamin H. Settle
United States District Court
1717 Pacific Avenue, Room 3144
Tacoma, WA 98402-3234

Re: *1LT Ehren Watada v. John M. Head, et al.*
No. 3:07-cv-5549 BHS

Dear Judge Settle:

When I arrived at work this morning, I was greeted by a single-page Order from the Court of Appeals for the Armed Forces ("CAAF"), denying Lt. Watada's application for a stay of trial proceedings, and denying Lt. Watada's motion for review of his case. Thus, even assuming for the sake of argument that exhaustion of all pre-trial avenues of review in the military justice system was required, that has been accomplished. A copy of that Order is attached.

In addition to the supplemental authority Mr. Lobsenz will be providing, as discussed in oral argument yesterday, there is one matter we wish to bring to your attention, related to review in the Army Court of Criminal Appeals ("ACAA") and CAAF, as it might well have a bearing on your decision.

In argument yesterday, Mr. Kipnis told you that Lt. Watada had already had his "appeal of right" in the ACCA, and that his motion directed to the CAAF was in the nature of a "motion for discretionary review." Mr. Kipnis was mistaken.

Lt. Watada has ***not*** had an "appeal of right." What he filed in the ACCA was a "Petition for Extraordinary Relief in the Nature of a Writ of Prohibition." It was a request to the ACCA to exercise its discretion to stay the proceedings and give Lt. Watada a meaningful review of his case. Without hearing the requested oral argument, ACCA twice declined to intervene in the case. Copies of the two ACCA Orders are attached hereto.

Likewise, the request to the CAAF was in the same nature. It was a request directed to the CAAF to exercise its discretion to intervene and provide Lt. Watada with a meaningful review of his case. Just as did the ACCA, the CAAF, without hearing argument, declined to intervene.

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For these reasons, it is inaccurate to suggest that Lt. Watada has had a meaningful appellate review in the nature of an "appeal of right." In both cases (the ACCA and the CAAF), those courts declined to exercise their appellate jurisdiction to accept review. Neither court entertained oral argument, nor did either court provided the type of analysis a party would expect after a fully-considered appeal.

It is for that reason that a Writ of Habeas Corpus and an immediate Stay of Proceedings pursuant to U.S.C. § 2241 is appropriate and necessary in this case.

Thank you for your consideration.

Very truly yours,

CARNEY BADLEY SPELLMAN, P.S.

Kenneth S. Kagan

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cc: Mr. Brian C. Kipnis, AUSA

United States Court of Appeals for the Armed Forces Washington, D.C.

Ehren K. WATADA, Appellant	)	USCA Dkt. No. 07-8023/AR
	)	Crim.App. No. 20070834
v.	)	ORDER
Lieutenant Colonel John M. HEAD,	)	
and	)	
Lieutenant General Charles JACOBY,	)	
and	)	
UNITED STATES, Appellees	)	

On consideration of the writ-appeal petition for review of the decision of the Army Court of Criminal Appeals and the motion for immediate stay of proceedings, it is, by the Court, this 5th day of October, 2007,

ORDERED:

That said motion for stay is hereby denied; and

That said writ-appeal petition is hereby denied.

For the Court,

William A. DeCicco

William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (KAGAN, Esq.)
Appellate Government Counsel (KAZIN)

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MAHER, SULLIVAN, and HOLDEN
Appellate Military Judges

First Lieutenant EHREN K. WATADA, Petitioner
v.
The United States of America,
and
Lieutenant Colonel JOHN M. HEAD,
and
Lieutenant General JAMES DUBIK,
and
Brigadier General WILLIAM TROY,
Respondents

ARMY MISC 20070535

ORDER

Petitioner has filed a motion for extraordinary relief to enjoin his upcoming court-martial on former jeopardy grounds without first moving to dismiss under R.C.M. 907(b)(2)(C) and 915(c)(2). Under these circumstances, we deny petitioner's motion for extraordinary relief. Our order of 18 May 2007 is vacated.

DATE: 29 June 2007

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-CR2
JALS-GA
Petitioner
Respondents

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
HOLDEN, HOFFMAN, SULLIVAN
Appellate Military Judges

First Lieutenant EHREN K. WATADA, Petitioner
v.
Lieutenant Colonel JOHN M. HEAD,
and
Lieutenant General CHARLES H. JACOBY,
and
The United States Army
and
The United States of America
Respondents

ARMY MISC 20070834

ORDER

WHEREAS, in a series of pleadings filed with this Court,* Petitioner first requested, *inter alia*, dismissal for violation of the Double Jeopardy Clause of the United States Constitution and Article 44, Uniform Code of Military Justice, 10 U.S.C. § 844 [hereinafter UCMJ];

WHEREAS, after our denial of the initial requested relief as premature, Petitioner unsuccessfully moved at trial to dismiss;

WHEREAS, Petitioner subsequently moved, in the form of a request for reconsideration, that we decide the Double Jeopardy claim on its merits;

WHEREAS, Petitioner has requested a stay in trial proceedings and other extraordinary relief, oral argument before our court, and leave to file a response to Respondent's most recent filing entitled, "Initial Response in Opposition";

WHEREAS, Petitioner on 27 August 2007 moved for expedited decision on the pending defense motions in this case.

NOW, THEREFORE, IT IS ORDERED:

That the Motion for Reconsideration is GRANTED to the extent that we decide on the merits the motions to dismiss, stay, or grant other extraordinary relief;

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* *See also* ARMY MISC 20070535

WATADA – ARMY MISC 20070834

That the Motion for Leave to File Response to Respondent's "Initial Response in Opposition" is GRANTED and said Response has been considered by this court;

That the Motion for Expedited Decision is GRANTED.

That all remaining motions are DENIED. We have reviewed the findings of fact and conclusions of law issued by the trial court and find the military judge did not abuse his discretion by granting the mistrial. *See United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). "A military judge has 'considerable latitude in determining when to grant a mistrial.'" *Id.* (quoting *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998)). "This Court will not reverse the military judge's decision absent clear evidence of abuse of discretion." *Id.* (citing *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993); *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990)). Further, we find no violation of the Double Jeopardy clause or Article 44, UCMJ, and decline to dismiss, stay, or further delay the proceedings.

DATE: 28 August 2007

FOR THE COURT:

Malcolm H Squires

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-CR2
JALS-GA
Petitioner
Respondents